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No. 98-1999

In The

# Supreme Court of the United States

ADELYN L. LUTHER,

*Petitioner,*

v.

COMMISSIONER OF REVENUE,

*Respondent.*

**On Petition For Writ Of Certiorari To The Minnesota Supreme Court**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Does Minnesota's taxation of the entire net income of a nondomiciliary resident who maintains an abode in the State, spends in the aggregate more than one-half of the tax year in the State, and has substantial financial interests located in the State, violate the Due Process Clause of the United States Constitution?

2. Does the imposition of Minnesota's individual income tax on the entire net income of a nondomiciliary resident who maintains a place of abode in Minnesota and spends more than one-half of the tax year in Minnesota implicate the Commerce Clause of the United States Constitution?

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Commissioner of Revenue respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court is reported at 588 N.W.2d 502 (1999), and is reproduced in the Petitioner's Petition for Writ of Certiorari at App. A-1. The opinion of the Minnesota Tax Court is reported in Westlaw. *See Luther v. Commissioner of Revenue*, No. 6746, 1999 WL 37496 (Minn. T.C. Jan. 27, 1999). The tax court opinion is also reproduced in the Petition for Writ of Certiorari at App. A-21.

## STATEMENT OF THE CASE

Respondent adopts the Minnesota Supreme Court's description of this case as it appears in 588 N.W.2d at 504 – 06 and at App. A-2 – A-7, and Respondent accepts the Statement of the Petitioner at pages 2-4 of the Petition as being generally accurate. However, Respondent notes in addition that, although not clearly acknowledged in the Petition, it is undisputed Petitioner was physically present in Minnesota on 189 separate days during the 1990 tax year in issue. 588 N.W.2d at 507, App. A-8. During eighteen of those days, which the Minnesota Supreme Court referred to as "travel days," she either arrived in or departed from Minnesota. 588 N.W.2d at 505, App. A-4. Minnesota law treats an individual's presence in Minnesota for any portion of a day as a day spent in Minnesota for purposes of computing whether the individual spent

more than one-half of a tax year in Minnesota.[1] The correctness of the Minnesota Supreme Court's determination, in applying Minnesota law, that Petitioner spent more than one-half of the 1990 tax year in Minnesota, is not presented to this Court by the Petition for Writ of Certiorari. This "computational" issue is relevant only to the extent that it bears on the questions presented by Petitioner's Due Process or Commerce Clause Claims.[2]

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[1] An administrative rule, which has the force and effect of law in Minnesota, excludes from the computation of Minnesota days any period of less than 24 hours spent in Minnesota when the individual is in transit between two points outside of Minnesota. 588 N.W.2d at 507-08, App. A-9 – A-10; *see* Minn. Stat. §§ 14.38, subd. 1, 270.06(13) (1990). The rule did not apply to exclude any of Petitioner's eighteen travel days from the computation of days spent in Minnesota, because in all cases she was either traveling to Minnesota, as her destination, or departing from Minnesota, after a stay of substantially more than 24 hours. 588 N.W.2d at 508, App. A-10; *see* Minn. R. 8001.0300, subpt. 4 (1989).

[2] The introductory paragraphs preceding Petitioner's statement of the Questions Presented (Pet. at i), characterize Minnesota law as imposing an income tax on *all* the income of individuals domiciled in Minnesota and, generally, only on the *Minnesota-source income* of individuals domiciled elsewhere. This statement creates the erroneous impression that the Minnesota tax is imposed on the basis of domicile, rather than residency. More precisely, as is acknowledged expressly elsewhere in the Petition, Minnesota law imposes a tax on all the income of Minnesota "residents," whether or not they are Minnesota domiciliaries, and only on the Minnesota-source income of "non-residents." *See* Petition at 2-3. Domicile is but one of the tests for determining residency in Minnesota under Minnesota law. *See* Minn. Stat. § 290.01, subd. 7 (1990).

## REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The decision of the Minnesota Supreme Court is not contrary to the decisions of this Court, or to those of any other state court of last resort, or to those of a United States Court of Appeals. Nor do the facts of this case present an important question of federal law that has not been, but should be, settled by this Court. Petitioner has demonstrated no need for the Court to clarify or reexamine the well-established rationale for state taxation of the income its residents earn from all sources under *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937), *Lawrence v. State Tax Commissioner*, 286 U.S. 276 (1932), and *Maguire v. Trefry*, 253 U.S. 12 (1920). *See Guaranty Trust Company v. Virginia*, 305 U.S. 19 (1938) (income from out-of-state trust taxable by beneficiary's state of residence). This is particularly so where Minnesota, the state of residence, provides a credit for income taxes paid to the resident taxpayer's state of domicile, thus avoiding any potential risk of double taxation by the state of domicile. 588 N.W.2d at 510, App. A-14; *see* Minn. Stat. § 290.06, subd. 22 (1990) (App. A-33).

Nor does the Petition frame any federal question which it is necessary for this Court to resolve to guide the states in the maintenance of their income tax systems. Given the wide latitude accorded to the states in the determination of their tax schemes in our federal system, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), this case presents no compelling reason for the reexamination of the fundamental basis for a state's income taxing authority with respect to its residents. As Petitioner

points out, at least twenty-three other states employ statutes defining nondomiciliary residents in a manner similar to Minnesota law.[3] Petition at 6 and note 4. Yet, Petitioner has not presented any evidence of a division among state courts on the issues raised by the Petition, and Respondent is not aware of any.

## I. Petitioner Has Failed To Establish That Minnesota's Imposition Of Tax On The Entire Net Income Of Nondomiciliary Residents Violates The Due Process Clause.

Petitioner asserts that Minnesota's taxation of her entire net income, as a nondomiciliary resident of the State, violates the Due Process Clause. In arguing her position, Petitioner does not apply the standards established by this Court to determine the constitutionality of an individual income tax. Rather, Petitioner relies heavily on state corporate tax cases involving the issue of taxable "business income" versus exempt "nonbusiness income." In contrast, the court below properly applied the principles applicable to individual income tax cases and correctly determined that the tax at issue in this case does not offend the Due Process Clause.

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[3] Indeed, it has been noted that only a handful of states limit their definition of "resident" to persons domiciled in the state. Seth Goldstein, Note, "Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, 91 COLUM. L. REV. 119, 122 n.19 (1991).

### A. The Minnesota Supreme Court Applied The Proper Constitutional Standards And Correctly Decided The Due Process Issue.

This Court has established a two-pronged inquiry for due process issues in state tax cases: (1) whether there is "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax;" and (2) whether the "income attributed to the State for tax purposes [is] related to 'values connected with the taxing State.' " *Quill Corporation v. North Dakota*, 504 U.S. 298, 306 (1992) (citations and internal quotation omitted).

In concluding that the facts in this case satisfy the first prong of the *Quill* test, the Minnesota Supreme Court observed that Petitioner both spent a substantial period of time in Minnesota during the tax year in question and maintained a place of abode in the State during that period. 588 N.W.2d at 508-09. Holding that the facts also satisfy the second prong of the *Quill* test, the court below relied on Petitioner's acceptance and enjoyment of the many services, benefits, and protections Minnesota afforded her person, property, and financial interests during the tax year in issue. *Id.* at 509. The court properly found that Minnesota's requirement that Petitioner contribute to the costs of government associated with providing those services, benefits, and protections satisfies due process because it is rationally related to her receipt thereof. *Id.*

### B. Petitioner's Due Process Arguments Provide No Reason For Review.

Petitioner makes two main arguments in support of her position that the decision of the Minnesota Supreme Court on the due process issue is incorrect. First, Petitioner relies on this Court's line of state corporate tax cases standing for the proposition that a state may not constitutionally tax income from transactions having an out-of-state situs if they serve merely an investment, as distinguished from an operational, function. *See, e.g., Allied Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 787 (1992). Second, Petitioner contends that application of the Due Process Clause to state individual income tax statutes prohibits taxation of income from intangibles located outside the taxing state, unless the taxpayer is *domiciled* in the taxing state. Petition at 7-13. Neither of these arguments finds support in the decisions of this Court determining the authority of states to impose individual income taxes within the parameters of the Due Process Clause.

The court below properly rejected Petitioner's reliance on state corporate tax cases, observing that there is no due process requirement that corporations and individuals be treated exactly the same for tax purposes, and in the absence of arbitrary distinctions, the due process concern with the possibility of multiple taxation in corporate tax cases is not present in connection with individual taxpayers. 588 N.W.2d at 509-10, App. A-13 – A-14. *See Lawrence v. State Tax Commissioner*, 286 U.S. 276, 283 (1932); *Shaffer v. Carter*, 252 U.S. 37, 58 (1920). For these reasons, the corporate tax cases relied upon by Petitioner,

which are concerned with the apportionment of operational business income, as distinguished from investment income, have no application to this case. In any event, as the court below pointed out, there is no risk of multiple taxation in this case because Minnesota provides a credit for income tax paid to a nondomiciliary resident's state of domicile. 588 N.W.2d at 510, App. A-14; *see* Minn. Stat. § 290.06, subd. 22(a) (1990).

In addition to rejecting Petitioner's mistaken reliance on state corporate tax cases, the court below correctly rejected her contention that under the Due Process Clause the taxation of income derived from out-of-state intangibles is limited to taxpayers *domiciled* within the taxing state. 588 N.W.2d at 510, App. A-14 – A-15. While the decisions relied upon by Petitioner as support for this contention involved taxpayers who apparently were domiciliaries of the taxing states, they were not grounded on the domiciliary status of the taxpayers. Rather, the reasoning of this Court in deciding those cases[4] also applies to nondomiciliary residents of a taxing state, such as Petitioner, whose substantial connections with Minnesota clearly are sufficient to satisfy the first requirement of due process analysis, and whose enjoyment of the numerous benefits and protections provided by the State satisfies the second requirement of that analysis. Indeed, as Petitioner notes, the Court, in a number of decisions pertinent to the issues in this case, has routinely

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[4] *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Lawrence v. State Tax Commissioner*, 286 U.S. 276 (1932); *Maguire v. Trefry*, 253 U.S. 12 (1920).

employed the terms "domicile" and "residence" interchangeably, drawing no distinction between their technical differences in meaning.[5] Petition at 5, note 3. At the same time, the Court has repeatedly emphasized that the constitutionality of taxing an individual's income from intangibles, on facts akin to the facts in this case, rests not on fine legal distinctions but on the realities of benefits and protections afforded the individual by the taxing state. *See, e.g., Maguire v. Trefry*, 253 U.S. 12, 14 (1920). As this Court has stated with respect to its analysis of constitutional questions generally:

> The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it

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[5] Petitioner's discussion of the doctrine of *mobilia sequuntur personam* (movables follow the [law of the] person) in connection with the Minnesota Supreme Court's holding on the Due Process Clause issue, Petition at 10, is misdirected. The court below referred to that doctrine only in connection with the Commerce Clause issue. 588 N.W.2d at 511-12, App. A-18. In any event, by its express language, the doctrine is not limited to domiciliaries of a state and was properly applied by the lower court in this case involving a nondomiciliary resident of a state.

> has conferred by the fact of being an orderly, civilized society.

*Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

In deciding this case, the Minnesota Supreme Court properly applied the standards established by this Court for the determination of constitutional questions and correctly held that the statute in issue does not offend the Due Process Clause. For that reason, and because Petitioner has not shown any conflict among lower courts respecting the due process issue in this case, there is no reason for this Court to undertake review of the holding of the court below on that issue.

## II. The Minnesota Supreme Court's Holding That The Taxation Of Petitioner's Entire Net Income On The Basis Of Her Minnesota Residency Does Not Implicate The Commerce Clause Does Not Warrant Review.

Petitioner also argues that the Minnesota Supreme Court erred when it determined that Minnesota's imposition of its income tax on nondomiciliary residents does not implicate the Commerce Clause. In holding that the Commerce Clause is not implicated, the court below observed that Petitioner 'must initially show that application of Minnesota's [nondomiciliary resident] statute has a substantial effect on an identifiable interstate economic activity or market.' 588 N.W.2d at 511, App. A-16. In determining that the application of Minnesota's statute does not have such an effect, the lower court first observed that the tax was not imposed as a result of Petitioner's movement across state lines, but as a result of

significant presence in Minnesota which qualified her as a nondomiciliary resident of the State. 588 N.W.2d at 511, App. A-17. The court said:

> [Petitioner] was required to pay Minnesota income tax on her net worldwide income because, through her substantial contacts with Minnesota, she availed herself of the many services, benefits, and protections provided to her by Minnesota. The requirement that she pay Minnesota income tax was triggered by conduct that took place wholly within Minnesota and that did not substantially affect interstate commerce.

*Id.*

The Minnesota Supreme Court's decision that application of Minnesota's nondomiciliary residency statute to Petitioner does not implicate the Commerce Clause is consistent with the recent decision of the New York Court of Appeals in *Tamagni v. Tax Appeals Tribunal*, which this Court declined to review. 695 N.E.2d 1125 (N.Y.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 340 (1998). Although there are factual distinctions between that case and this, the New York case presented a separate basis for Commerce Clause scrutiny that is not presented by the Petition – the potential for double taxation, by New York and New Jersey, of the taxpayers' income from intangible property. Unlike Minnesota, New York did not allow a credit to taxpayers for tax paid to other states with respect to intangible income having no identifiable situs. *See Tamagni*, 695 N.E.2d at 1129. Minnesota expressly provides a credit for taxpayers, such as the Petitioner, where an

income tax upon the same income subject to tax by Minnesota has been paid to another state. *See* Minn. Stat. § 290.06, subd. 22 (1990).

In attempting to show that the facts of this case implicate the Commerce Clause, Petitioner revisits her state law statutory construction argument to the effect that the eighteen "travel days" should be treated as days spent both within and outside Minnesota. Petition at 15. That state law argument was rejected by the Minnesota Supreme Court and is not on appeal to this Court. *See* 588 N.W.2d at 507, App. A-8 – A-9. Respondent notes, however, that the Minnesota statute takes a reasonable approach to resolving the computational problem of determining whether a taxpayer resided in the state for more than one-half of a tax year. It resolves this problem by counting the "days" the taxpayer spent in Minnesota, and by treating any part of a "day" in Minnesota as a Minnesota day.[6] Since most taxpayers will be able to maintain diaries, showing where they spent a given day, the use of "days" is reasonable.[7] Petitioner's objections to Minnesota's choice of a reasonable computational method

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[6] It is unclear whether Petitioner would find Commerce Clause problems with a system which divided the tax year into "hours" or "minutes" or "seconds" in Minnesota, with the attendant bookkeeping problems. Nor is it clear from the record of this case whether Petitioner actually spent more or less than one-half of the hours in any of the disputed 18 travel days in Minnesota.

[7] Nor is Minnesota alone in its treatment of any portion of a day in Minnesota as "a day" in the state. *See, e.g., Leach v. Chu*, 540 N.Y.S. 2d 596, 597 (N.Y. App. Div. 1989).

ultimately border on the trivial and do not rise to a level sufficient to require Commerce Clause scrutiny.

Petitioner relies primarily on three decisions of this Court in support of her claim that the Commerce Clause is implicated in this case. Petition at 14-15. As is demonstrated in the following paragraphs, those three decisions are clearly distinguishable from this case.

The first case, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), involved a Commerce Clause challenge to a discriminatory tax statute described by the Court as "singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business." 520 U.S. at 576. No such discrimination is effected by the statute at issue in this case, which treats alike all nondomiciliary taxpayers who meet a threshold residency requirement of maintaining an abode and spending more than one-half of a tax year in Minnesota. In *Camps Newfound/Owatonna*, the Court expressly rejected the claim that the Commerce Clause was not implicated. It held the Commerce Clause was applicable because the *in-state camp itself* was clearly a participant in interstate commerce, both as a purchaser and as a provider of goods and services. 520 U.S. at 572-74. The Court did not, however, hold that the *campers* themselves were "articles of commerce" or that they were engaged in interstate commerce when they crossed state lines to attend an out-of-state camp, which would be closer to the Petitioner's claim in this case. *Id.*

Petitioner also claims the Commerce Clause is implicated based on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which was also relied on by the Court

in *Camps Newfound/Owatonna* (520 U.S. at 573). This case concerned Congress' efforts under the Civil Rights Act of 1964 to eliminate racial discrimination in public accommodations. 379 U.S. at 250. The Court determined that the Commerce Clause was implicated as a result of "voluminous testimony" before Congress presenting "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." 379 U.S. at 253. There clearly are no facts raised by the Petition to justify a determination that Petitioner, a nondomiciliary resident of Minnesota with substantial property and business interests in the state, as opposed to the hotels or motels where she may stay for her convenience, during her occasional winter returns to Minnesota, is engaged in interstate commerce or substantially impacts interstate commerce.

The last case Petitioner relies on, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), involved a Commerce Clause challenge to a state severance tax. There the Court held that:

> State taxes levied on a "local" activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry.

*Id.* at 616 (citation omitted). This case dealt not with a purely "local" activity, as Petitioner suggests (Petition at 15), but with the timing question of whether activities occurring prior to the point at which goods enter the stream of commerce may "substantially affect interstate commerce." *Id.* There is no relationship between Montana's imposition of a "severance tax" on coal, the burden

of which was largely exported to the rest of the nation, and Minnesota's imposition of an income tax on persons having a substantial presence in Minnesota. Petitioner's "presence" in Minnesota is simply not the subject of a tax that Minnesota seeks to or could "export" to persons in other states in the course of interstate commerce.

Notwithstanding the clear factual distinctions between this case and the decisions relied upon by Petitioner, she argues that the taxation of her entire net income as a nondomiciliary resident serves to unduly burden interstate commerce by impeding her from "pursuing business opportunities requiring a presence in Minnesota," as well as having a negative effect on interstate businesses and the travel industry. Petition at 15-16. Petitioner makes these arguments in purely speculative fashion, without citing any factual data to show that the statute at issue has any impact whatever on interstate commerce. Moreover, as observed in connection with Petitioner's due process argument, Petitioner disregards the fact that Minnesota law provides a credit for income taxes paid to a nondomiciliary resident's state of domicile. *See* Minn. Stat. § 290.06, subd. 22(a) (1990). But for the fact that Petitioner is domiciled in a state which has no individual income tax, she would have received a credit from Minnesota for any tax she paid to Florida on her intangible income. Petitioner's speculation regarding the impact of the Minnesota tax on businesses and hotels notwithstanding, any impact has not been shown to be substantial enough to implicate the Commerce Clause.

Finally, as with her due process claims, Petitioner has failed to show any split in decisions of lower courts relating to similar tax statutes. In fact, the only two

decisions involving similar statutes of which Respondent is aware are in harmony with the Minnesota Supreme Court's decision, inasmuch as they also sustain the constitutionality of the nondomiciliary resident tax laws in question. *See Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1132-33 (N.Y.), *cert. denied*, ___U.S. ___, 119 S. Ct. 340 (1998) (holding statute taxing nondomiciliary commuter residents owning permanent place of abode in state and spending in excess of 183 days in state on their worldwide income does not implicate Commerce Clause); *People ex rel. Ryan v. Lynch*, 186 N.E. 28, 29 (N.Y. 1933) (holding taxation of nondomiciliary's entire net income on basis of permanent abode and residency in state does not present federal constitutional question).

As the Minnesota Supreme Court stated: "The purpose of the dormant Commerce Clause is not 'to protect state residents from their own state taxes.' " 588 N.W.2d at 511, App. A-16, *citing Goldberg v. Sweet*, 488 U.S. 252, 266 (1989). Rather, its purpose is to protect "markets and participants in markets." *Id.*, *citing General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). As the Minnesota court further observed, "it is not [Petitioner's] movement across state lines that is being taxed." 588 N.W.2d at 511, App. A-17. Rather, it is because, "through her substantial contacts with Minnesota, she availed herself of the many services, benefits and protections provided to her by Minnesota," that she was taxed on her net worldwide income. *Id.* In short, it is largely because Petitioner chose to reside at her house in Minnesota for a substantial part of the tax year and avail herself of Minnesota's benefits and protections, not because of her two five-day winter trips back to Minnesota, that she is taxable as a Minnesota resident.

This type of personal activity by a taxpayer does not implicate the Commerce Clause, as the Minnesota Supreme Court correctly held. *See United States v. Lopez*, 514 U.S. 549, 559, 567 (1995) (only economic activity which "substantially affects" interstate commerce implicates Commerce Clause).

Because the Minnesota Supreme Court held that the Commerce Clause was not implicated by Minnesota's nondomiciliary resident income tax, it did not address the merits of Petitioner's Commerce Clause arguments.[8] 588 N.W.2d at 512, App. A-18. Respondent argued before the lower court that the Minnesota tax complied with all four prongs of the Commerce Clause test announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977), which provides that a lawful state tax (1) is applied to an activity with a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. Respondent argued below that Petitioner's extensive contacts with Minnesota, where she owned an abode, among other assets, and was physically present on more than one-half of the days in the 1990 tax year, satisfied the first and fourth prongs of the *Complete Auto* test. With respect to the second prong, Respondent argued that the fair apportionment requirement was satisfied by Minnesota's provision of a credit for income tax paid to other states on any income which was also subject to the Minnesota tax and that income

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[8] Petitioner has briefly summarized her lower court arguments with respect to the merits of her Commerce Clause claims at the end of the Petition. Pet. at 17-18.

from intangibles, having no situs in any state, was properly taxed by the state of residency. As to the third prong of the test, Respondent argued that the Minnesota statute's method of counting days spent in Minnesota is a practical and rational means of determining whether an individual has spent more than one-half of a tax year in the state and does not favor intrastate commerce at the expense of interstate commerce. *See Goldberg v. Sweet*, 488 U.S. 252, 266 (1989). Respondent concluded by arguing that Petitioner had a substantial nexus with Minnesota during the tax year, which provided her access to the protections and benefits provided by the State, and was not subject to a risk of multiple taxation by the Minnesota tax.[9]

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[9] In *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125 (N.Y. 1998), the New York Court of Appeals similarly concluded that the dormant Commerce Clause was not implicated by New York's resident income tax statute. There, however, the court proceeded to an analysis of the tax statute on the assumption that the Commerce Clause might be held applicable. It first determined that because the tax "does not operate to the disadvantage of any identifiable interstate market, it does not violate the dormant Commerce Clause," and it was unnecessary to consider the *Complete Auto* test. 695 N.E.2d at 1131. It then determined that even if it proceeded to an analysis of the tax under *Complete Auto*, the tax was constitutional. 695 N.E.2d at 1133-34.

## CONCLUSION

For the reasons presented in this Brief in Opposition, the Petition should be denied.

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